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Supreme Court, U.S.
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NO. 00-1442

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

ERIC R. MEYER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Did the District Court's application of the United States Sentencing Guidelines, § 2D1.1(d)(1), cross-referencing for and finding defendant Eric Meyer guilty of murder, violate the Fifth and Sixth Amendments to the United States Constitution in light of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), where the indictment charged only a violation of 21 U.S.C. § 846, the jury made no finding as to Meyer's guilt beyond a reasonable doubt, and Meyer's sentence was enhanced to one of life imprisonment?

2. Does the imposition of a sentence above the twenty year statutory maximum for "unspecified drug quantities" set forth in 21 U.S.C. § 841(b)(1)(C), violate the Fifth and Sixth Amendments to the United States Constitution in light of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), where the indictment did not allege the quantity of cocaine and marijuana, and where the jury was not instructed that the drug quantity was an "element" of the 21 U.S.C. §§ 841 & 846 offense and the jury made no findings as to the quantity?

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INTRODUCTION

In its Brief in Opposition, Respondent conceded the applicability of the Supreme Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), to prosecutions brought under 21 U.S.C. § 841 (a)(1) and § 841(b). *See* Opp'n at 11-12. Despite this concession, Respondent contends that in this case, Petitioner, Eric Meyer, should not be afforded the protections established by *Apprendi*. It argues that Petitioner's life sentence does not violate his constitutional rights to due process and a trial by jury even though the sentence exceeded the applicable statutory maximum of twenty years and was the result of being found

guilty of first degree murder, a crime for which he was never charged nor convicted of by a jury.

Respondent also argues that Petitioner is not entitled to reconsideration of his life sentence under *Apprendi* because he waived his right to appeal the now-accepted quantity issue by failing to raise the issue before bringing this petition. Both of these arguments ignore existing precedent and rely on arguments that are contrary to this Court's holding in *Apprendi*.

ARGUMENT

I. RESPONDENT'S ARGUMENTS IN TWO PRIOR CASES DO NOT SUPPORT THE OPPOSITION IN THIS CASE.

In response to Petitioner's reliance on *Apprendi* and its requirement that any facts, other than prior convictions, that increase a defendant's penalty for the crime charged beyond the statutory maximum be submitted to a jury and found beyond a reasonable doubt, Respondent refers the Court to its oppositions in two prior cases, *Hoff v. United States*, 526 U.S.1070 (1999)(No. 98-7238) and *Brown v. United States*, No.00-6846.

However, Hoff appealed his life sentence before the Court's decision in *Apprendi* and its holding that a court's consideration of "other relevant conduct" was subject to constitutional impediments. In fact, Hoff conceded on appeal that a district court could consider conduct that would constitute another offense with which the defendant had not been charged, so long as the conduct had been proved to the sentencing court by at least a preponderance of the evidence. *See* Opp'n *Hoff* Br. at 8.

Apprendi plainly states that facts that constitute a

separate offense must be charged in the indictment. Also, if those facts increase the defendant's penalty beyond the maximum prescribed by the statute, they must be submitted to a jury and found beyond a reasonable doubt. 530 U.S. at 490 - 494, 120 S.Ct. at 2363-2365.

In *Brown v. United States*, the Court in fact granted Brown's Petition for Writ of Certiorari, vacating his sentence and remanding the case for reconsideration in light of *Apprendi*. 2001 U.S. LEXIS 1100, 69 U.S.L.W. 3551(2001). Petitioner seeks a Writ of Certiorari based upon the same grounds for which this Court granted Brown's petition.

Second, just as in *Brown*, the district court's sentence increased Petitioner's penalty beyond the statutory maximum. Respondent concedes that the district court's discretion in considering "other relevant conduct" during sentencing is limited by the applicable statutory maximum. *See* Opp'n at 7. The jury did not find Petitioner guilty of distributing a particular quantity of drugs, and therefore faced a statutory maximum of twenty years. *See* Opp'n at 11; *see also* 21 U.S.C. § 841(b)(1)(C). Thus, any sentence over twenty years exceeded the applicable statutory maximum and clearly was unconstitutional.

II. PETITIONER DID NOT WAIVE HIS RIGHT TO APPEAL HIS LIFE SENTENCE.

Respondent contends that Petitioner is not entitled to reconsideration of his sentence because he would be hard pressed to satisfy the "plain-error" standard of review and

because he waived his right to appeal this issue.[1] *See* Opp'n at 11-15.

However, as Petitioner pointed out in his petition, he did not challenge his enhanced sentence under the now-accepted quantity issue, either before the district court or on appeal, because the law in effect at the time in the Seventh Circuit was well settled, and there did not exist an appealable issue. Prior to the Seventh Circuit's holding in *United States v. Nance*, the quantity of a controlled substance was not an element of a § 846 or § 841 offense, but rather a sentencing factor that a court could consider during sentencing. *See United States v. Edwards*, 105 F.3d 1179 (7th Cir. 1997); *United States v. Jackson*, 207 F.3d 910 (7th Cir. 2000).

On December 29, 2000, several weeks after the Seventh Circuit's denial of Petitioner's appeal, it issued its decision in *Nance*, recognizing *Apprendi's* effect and reversing its prior line of authority that quantity was a sentencing factor. 236 F.3d 820(7th Cir. 2000).

Respondent's position that Petitioner is not entitled to

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[1]The Addendum to the Presentence Report provided the objections submitted by the defendant and the United States prior to sentencing. Page 2 of the Addendum states: "Paragraph 16: Defense objects to the amount of drugs attributed to Eric Meyer. Defense believes that a guideline range of 28 would be more accurate in accounting for drug quantities and distribution in which defendant Meyer was involved." Respondent nevertheless contends that, despite this objection to the PSR findings, Petitioner did not separately object to the district court's acceptance of the quantity findings.

appeal the quantity issue is further compromised by the Seventh Circuit's recent decision in *United States v. Noble*, 246 F.3d 946 (7th Cir. 2001). The Court there stated that, "[w]e recognize that *Apprendi* was not the law at the time the district judge conducted (the) trial. *However, for an error to be plain, it is sufficient for it to be 'clearly contradictory to the law at the time of appeal.'* " *Noble*, 246 F.3d at 955 (emphasis added). Petitioner may bring this issue before the Court as the error by the district court during sentencing now is "clearly contradictory to the law at the time of appeal.".

Finally, *Nance*, as well as the law of other circuits, clearly states that the statutory maximum under 21 U.S.C. § 841(b)(1) is twenty years when quantity is not charged in the indictment and not found by a jury beyond a reasonable doubt. *See Nance*, 236 F.3d at 824-825; *see also United States v. Noble*, 246 F.3d at 955. Petitioner was sentenced under 21 U.S.C. § 841(b)(1)(A), despite the fact that quantity was not charged in the indictment and the jury was not charged to make any findings as to quantity. Plain error exists because Petitioner was sentenced under the enhanced penalty provisions of 21 U.S.C. § 841(b)(1)(A) and the life sentence far exceeded the applicable statutory maximum. Consequently, Petitioner's sentence should be vacated and he should be resentenced in light of *Apprendi*.

CONCLUSION

For the above stated reasons, this Court should grant Petitioner-Defendant Eric R. Meyer's petition for Writ of Certiorari, vacate Meyer's sentence and remand to the Seventh Circuit for reconsideration of his sentence in light of this Court's decision in *Apprendi*.

Respectfully Submitted,

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